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IN THE SUPERIOR COURT

STATE OF ARIZONA, COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	V1300CR201080049 **SUPPLEMENT TO STATE'S MOTION FOR PROTECTIVE ORDER** **RE: STATE'S NOTES FROM INTERVIEWS** **Div. PTB**

The State of Arizona, through undersigned counsel, hereby supplements its previously filed Motion for Protective Order to set forth alternative methods, other than disclosure of an attorney's work product notes, of providing a defendant with notice of an expert's testimony in the event the expert does not produce a written report.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Rule 15.1(b)(4) does not require an expert witness to produce a written report.

Rule 15.1(b)(4), Ariz. R. Crim. P., requires the State to disclose the names and addresses of experts . . . "together with the results of physical examinations of scientific tests, experiments or comparisons that have been completed." There is nothing in the plain language of the rule that requires an expert to produce a written report. In *State v. Roque,* 213 Ariz. 193, 206, 141 P.3d 368, 381 (2006), the trial court had ruled that the State was required to disclose a written report

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by an expert only if one was prepared. The trial court had further ruled that the State was not required to disclose "an overview" or "outline" of an expert's opinion in the absence of a written report. *Id.* at ¶ 26- ¶ 27, 141 P.3d at 381. On review, the Arizona Supreme Court considered the scope of disclosure required under Rule 15.1(a)(3),[1] Ariz. R. Crim. P., and concluded "Rule 15.1(a)(3) applies ***even if an expert has not written down*** the 'results of physical examinations and of scientific tests, experiments or comparisons,' so long as such results are known to the state." *Id.* at ¶ 40, 141 P.3d at 383-384 (emphasis added).

Under the standard established in *Roque* and Rule 15.1(b)(4), Ariz. R. Crim. P., the State (and the defendant under Rule 15.2(c)(2)) are required to provide notice to the opposing party of the scope of an expert witness's expected testimony. In the event an expert does not produce a report, this notice must still be provided in some alternative form. Defendant's position appears to be that in the absence of a written report, he is entitled to copies of the prosecutors' notes from pretrial interviews to the extent they contain "any and all" statements of the expert. This is not an "either/or proposition" as Defendant would lead the Court to believe. To the contrary, there are alternative methods available that comply with the standard set forth in *Roque* without infringing on the State's work product privilege.

II. Providing an overview of an expert's expected testimony, together with notice of all materials reviewed and a pretrial interview, complies with the disclosure obligations under Rule 15.1(B)(4).

While the Court in *Roque* held the State was required to make disclosure of an expert's expected testimony when the expert does not produce a written report, it reached no conclusion regarding the form of such disclosure. In *Roque* the defendant had requested the State produce an

[1] After Rogue's trial was completed, the Rule was renumbered as Rule 15.1(b)(4) and amended to delete the phrase, "including all written reports or statements." *Roque,* at n. 3; ¶31, 141 P.3d at 381.

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"overview" or "outline" of the expert's opinion. In the instant case, should any of the State's experts not produce a report, the State will provide Defendant with a "Notice of Expected Areas of Expert's Testimony" with an overview of the expected areas of the expert's testimony. In addition, the State will disclose to Defendant all information or materials furnished to the experts for their review and consideration in preparing for their testimony. Following this disclosure, the State will make the expert available to Defendant for an interview. This procedure will satisfy the purpose of Rule 15.1(b)(4) and *Roque* without violating the work-product privilege relating to attorneys' notes.

III. Under Rule 15.1(g), Ariz. R. Crim. P., a showing of "substantial need" is required prior to allowing access to attorney work product.

As noted above, *Roque* did not address the prosecutor's notes, nor did it address the issue of work product-privileged notes. The comment to Rule 15.4(a) plainly states that "an attorney's actual trial notes, such as his outline of questions to ask a witness will be encompassed within the work product exception of Rule 15.4(b)(1), even though they fall within the definition of statement." Any attempt to discover attorneys' notes must be analyzed under the standard set forth in Rule 15.1(g).

Rule 15.1(g), Ariz. R. Crim. P., provides:

> [u]pon motion of the defendant showing that the defendant has substantial need in preparation of the defendant's case for material or information not otherwise covered by Rule 15.1, and that the defendant is unable without undue hardship to obtain the substantial equivalent by other means, the court in its discretion may order any person to make it available to the defendant.

In *State ex rel. Corbin v. Ybarra,* 161 Ariz. 188, 777 P.2d 686 (1989), the Arizona Supreme Court recognized that the work product doctrine might not protect information that was not available to one of the parties in any other form. Specifically, the Court noted:

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On any consideration of the work product doctrine, we must consider an additional factor: availability of the item sought in discovery. If the information sought is equally available to both parties, it receives the broadest protection. *Cf. Hickman,* 329 U.S. at 511, 67 S.Ct. at 394. However, if the information sought is unavailable to one of the parties, the work product doctrine may not protect it, ensuring that both parties have equal access to all information necessary for a fair determination of the case. *Id.*

Indeed, the criminal rules explicitly recognize this principle of equal access to information. Rule 15.1(e)[2] (applying to defendants) and Rule 15.2(f)[3] (applying to the state) allow a party to obtain material on a showing of "substantial need" of the material, which the party cannot obtain without "undue hardship." These rules embody the concepts in *Hickman. See* Comment, Rule 15.1(e) (citing Rule 26(b)(3), Ariz.R.Civ.P, 16 A.R.S.) (embodying *Hickman*); *cf.* Rule 26(b)(4)(B), Ariz.R.Civ.P., 16 A.R.S. (allowing a party in a civil case to obtain discovery of information pertaining to non-testifying experts on showing "exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions ... by other means").

Id. at 194, 777 P.2d at 692.

In the instant case, any argument or court ruling mandating the disclosure of attorney work product is premature. Only after the disclosure process is complete, including the interviews of the expert witnesses of both parties, would either party be able to make the requisite showing of a "substantial need" as set forth in Rule 15.1(g), Ariz. R. Crim. P.

RESPECTFULLY submitted this 4th day of November, 2010.

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By_____
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[2] Rule 15.1(e) has been renumbered as 15.1(g).
[3] Rule 15.2(f) has been renumbered as 15.2(g)

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